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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MANZANARES,

Defendant and Appellant.

B154067

(Super. Ct. No. BA173713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Nora Genelin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Albert Manzanares appeals from a judgment of conviction entered after a jury found him guilty of aggravated assault (Pen. Code, § 245, subd. (a)(1)) and kidnapping (*id.*, § 207, subd. (a)), in the commission of which he personally used a deadly and dangerous weapon (*id.*, § 12022, subd. (b)(1)), personally inflicted great bodily injury (*id.*, § 12022.7, subd. (a)) and inflicted such injury under circumstances involving domestic violence (*id.*, § 12022.7, subd.(e)). The trial court thereafter sentenced defendant to state prison for the term prescribed by law.

Defendant contends the trial court instructed the jury erroneously on the element of asportation with respect to the kidnapping charge and improperly calculated his presentence custody credits. We reject defendant's contentions and affirm the judgment.

FACTS

At 11:00 p.m. on August 30, 1998, defendant picked up Terisa Kowal (Kowal), his girlfriend of more than three months, from work. He drove her to his house on Dewey Street between Olympic Boulevard and San Marino Street in Los Angeles County. After they arrived, defendant's nephew drove off in defendant's car. At the time, defendant was speaking to a nearby neighbor. Kowal heard defendant say he intended to "turn himself into jail." This upset Kowal, who left the residence and began walking down the block. Defendant followed her. When he caught up to Kowal, she told him she was going to walk home. Defendant offered to take her home. Kowal demurred, preferring to walk.

Defendant pinned Kowal against a fence. He would not allow her to continue walking. Defendant's nephew drove defendant's car to where defendant had Kowal pinned against the fence. Defendant asked his nephew to keep the car there. He asked Kowal to get in. She refused. When defendant then asked his nephew to tell her to get

into the car, Kowal told the nephew to “stay out of it.” The nephew walked back to defendant’s home. Defendant again asked Kowal to get into the car. She again refused. Defendant forced Kowal into the car by pushing her into the passenger seat. When she got out, he again forced her into it. When she managed to get out of the car yet again, defendant pushed her back in, sat on her lap, held her hands down and closed the passenger door. Defendant moved to the driver’s side, locked the car and began driving.

When they reached a stop sign, defendant retrieved a screwdriver from the glove compartment. Defendant turned right onto Olympic Boulevard, at which point it appeared to Kowal that he was driving her home. She asked him to let her go. He refused. After a while, defendant turned onto a side street. From there, he turned onto 12th Street. Defendant then parked the car. He rolled up the windows and turned up the radio. Defendant immediately swung his arm and stabbed Kowal in the chest. He climbed on top of her and continued stabbing her in the chest, face, scalp and upper arm. Kowal counted 40 to 45 stab wounds.

After inflicting the last wound, defendant sat back in the driver’s seat, lit a cigarette, started the car and began driving. As he was driving, he removed his shirt and wiped blood from Kowal’s face and the passenger window. When Kowal attempted to get out of the car, defendant re-locked the door, and then stabbed her again in the chest. Defendant traversed several blocks, finally pulling into parking lot. Fearing for her life, Kowal now succeeded in getting out of the car. She ran, with defendant following her in the car. Kowal eventually flagged down an oncoming car. As she asked the driver, Anne Ford (Ford), for help, defendant drove away. Ford opened the door, allowing Kowal to enter her car. Ford then complied with Kowal’s request to drive Kowal home. When Ford saw a police car, she contacted the officer.

Los Angeles Police Officer Thomas Jackson responded to a radio call directing him to Western Avenue and 12th Street. He accompanied Kowal to the hospital in the waiting ambulance, interviewing her en route. She remained hospitalized for three days.

Kowal's mother visited her daughter in the hospital on the morning Kowal was admitted. After leaving the hospital, the mother drove down defendant's street in search of his car. When she found the car, she looked inside, where she saw blood. The mother notified the police and told them where to find the car.

Defense

Defendant has an abnormality in the frontal lobe of his brain. An injury to the frontal lobe can remove restraints, causing irrational or impulsive actions. The injury could be congenital or acquired due to physical trauma.

Defendant has a very low intelligence quotient. He suffers from cognitive impairment. A person with defendant's test scores may think irrationally. Defendant's brain injury could affect his ability to reason, plan, remember and control emotional impulses.

DISCUSSION

Instruction on Asportation for Purpose of Simple Kidnapping

The jury was instructed with the pre-1999 version of CALJIC No. 9.50 which requires that the victim be moved for "a substantial distance, that is, a distance that is more than slight or trivial." During jury deliberations on January 26, 2000, the jury requested that the court "clarify substantial distance that is a distance more than slight or trivial." Upon inquiry, the jury indicated it wished to continue deliberating for the remainder of the day without an answer to the question. On the following day, deliberations began anew after the court substituted an alternate juror for a juror excused for misconduct. The jury then renewed its request for clarification.

The court informed counsel that it intended to answer the jury's request as follows: "The law does not provide an exact measure of substantial distance. The issue is one of fact for you to decide, not one of law for the court to decide. Based upon the facts

you determined from the evidence, you may decide the distance was substantial or that it was not substantial. Also, the term slight and the term trivial do not require any special legal definition. They are words used every day and it is just their common usage meaning.” Both the prosecutor and defense counsel agreed that this would be an appropriate response. The court thereupon instructed the jury accordingly.

Ordinarily, the failure to object below to an instruction waives any claim of error on appeal. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Defendant failed to object to the version of CALJIC No. 9.50¹ with which the jury was instructed. His failure to do so therefore waives his claim of error unless the asserted error affects his substantial rights. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) Defendant also failed to object to the court’s instruction in response to the jury’s inquiry, instead acquiescing in it. By doing so, defendant invited any error. (*People v. Pride* (1992) 3 Cal.4th 195, 228.) Having done so, he is estopped from claiming error on appeal. (*Ibid.*)

The claimed instructional error does not affect defendant’s substantial rights. The 1999 revision of CALJIC No. 9.50 is an outgrowth of the Supreme Court’s decision in *People v. Martinez* (1999) 20 Cal.4th 225, in which the Supreme Court holds that in considering whether the victim has been moved a substantial distance in a simple kidnapping case, the jury should not limit itself only to the actual distance involved, but instead should consider the “totality of the circumstances.” (*Martinez, supra*, at p. 237.) Consequently, the court notes, in an appropriate case, “the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim’s foreseeable attempts to escape and the attacker’s enhanced opportunity to commit

¹ This pre-1999 version of the instruction informed the jury that “[t]he movement of the other person was for a substantial distance, that is, a distance more than slight or trivial.”

additional crimes. . . . In addition, in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality. (*Ibid.*, fn. omitted.) The 1999 revision of CALJIC No. 9.50 instructs the jury to consider these factors, among others.

Had the jury been instructed with the 1999 revision of CALJIC No. 9.50, it is not reasonably probable that defendant would have achieved a more favorable result. The uncontradicted evidence demonstrates that defendant repeatedly forced Kowal into his car, eventually restraining her to keep her in it. He drove her away from a familiar area where she readily might have sought help to another area. When he reached a stop sign, he retrieved a screwdriver from the glove compartment. He turned onto a major thoroughfare, apparently heading for Kowal's house. After a while, however, he turned onto a side street, then turned onto 12th street, where he parked. Defendant rolled up the windows and turned up the radio, after which he began stabbing Kowal with the screwdriver.

In short, defendant moved Kowal several blocks, which movement was not incidental to the assault upon her, increased the risk of harm to her beyond that existing before the asportation, decreased the likelihood of defendant's detection and increased the danger inherent in defendant's enhanced opportunity to commit additional crimes. (*People v. Martinez, supra*, 20 Cal.4th at p. 237.) Inasmuch as the claimed instructional error does not affect defendant's fundamental rights, in that there is no reasonable probability he would have received a more favorable result, he has waived his right to assert the error on appeal. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

We note, in any event, that there was no error. The holding enunciated in *Martinez* is not retroactive. It did not apply to the defendant in the case then before the Supreme Court. (*People v. Martinez, supra*, 20 Cal.4th at p. 241.) Inasmuch as defendant committed the offenses at issue here in 1998, the trial court did not err in utilizing the pre-1999 version of CALJIC No. 9.50, in which the distance covered, and

whether it is substantial as opposed to slight or trivial, is the sole consideration before the jury in determining the element of asportation in a simple kidnapping case.

Conduct Credits

Defendant's arrests, convictions and sentencing in three separate criminal proceedings overlapped. The conduct credit issue thus is somewhat convoluted.

Defendant was arrested for the offenses at issue in this proceeding, case number BA173713, on August 31, 1998. He was sentenced on October 3, 2001 and received a total of 934 days of presentence credits, consisting of 813 days of actual custody and 121 days of conduct credit.

In case number BA201115, defendant was arrested on February 24, 2000, while awaiting sentencing in the instant matter, and sentenced on November 22, 2000. Inasmuch as he was in custody on the present case at the time he committed the offense at issue in case number BA201115, custodial possession of a weapon, defendant received no presentence credits in that proceeding.

In case number BA210817, again involving custodial possession of a weapon, defendant was arrested on November 12, 2000, while awaiting sentencing in case number BA201115, and sentenced on September 26, 2001. He received a total of 475 days in presentence credits, consisting of 317 days of actual custody and 158 days of conduct credits.

In awarding defendant presentence credits in the instant matter, the court determined that defendant was entitled only to credits from the date of his arrest to the date he first was sentenced in one of the other felony cases pending against him. That date was November 22, 2000, in case number BA201115. The court consequently calculated defendant's credits from his arrest on August 31, 1998 to his sentencing in case number BA201115 on November 22, 2000.

In California, "a defendant may not receive credit for time spent in jail awaiting disposition of criminal proceedings during the period a defendant is also serving a prison

sentence on another conviction.” (*People v. Wiley* (1994) 25 Cal.App.4th 159, 165, citing *In re Joyner* (1989) 48 Cal.3d 487, 492; *In re Rojas* (1979) 23 Cal.3d 152, 156.) Once defendant was sentenced in case number BA201115, all time served in custody was a credit against the eight-year sentence imposed in that case. Defendant has not demonstrated that he could have been released on bail or otherwise after he was sentenced in case number BA201115. In short, he has failed to demonstrate that he was entitled to duplicative credits under Penal Code section 2900.5. (*Wiley, supra*, at p. 166.) The superior court therefore did not err in calculating defendant’s presentence credits.

The judgment is affirmed.

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SPENCER, P.J.

We concur:

MALLANO, J.

RICO, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.